Supreme Court of the United States

OCTOBER TERM, 1948.

No. 500.

THE UNION NATIONAL BANK OF WICHITA, KANSAS, APPELLANT,

VS.

CARL C. LAMB, RESPONDENT.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF FOR APPELLANT.

MAURICE J. O'SULLIVAN,
Counsel for Appellant.

JOHN G. KILLIGER, JR.,
Of Counsel.

SUBJECT INDEX

TABLE OF CASES CITED

CONSTITUTION OF THE UNITED STATES

STATUTES AND RULES OF COURT

STATE LAWS

TEXTS

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 500.

THE UNION NATIONAL BANK OF WICHITA, KANSAS, APPELLANT,

VS.

CARL C. LAMB, RESPONDENT.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI.

OPINION BELOW.

The opinion of the Supreme Court of Missouri (R. 19) is reported in 216 S. W. 2d 416.

JURISDICTION.

(A)

The application for appeal was timely.

On January 31, 1949, this court ordered:

> "Further consideration of the question of the jurisdiction of this Court in this case is postponed to the hearing of the case on the merits. Counsel are requested to discuss on briefs and oral argument the question whether the application for appeal was timely."

28 U. S. C., Ch. 133, Section 2101 (c), as revised and effective September 1, 1948, provides that an appeal under *28 U. S. C., Section 1257 (b)*, as revised, "shall be taken or applied for within ninety days after the entry of such" (final) "judgment."

Final judgment was rendered September 13, 1948, in Division One of the Supreme Court of Missouri, by overruling Appellant's "Motion to Rehear or to Transfer the Cause to the Court *En Banc*" (R. 23). That date was the 256th day of 1948. Ninety days thereafter, or the 346th day, was Sunday, December 12, 1948. Such computation excludes the first and includes the last day, which was Sunday. The application for appeal was filed and it was allowed on the first secular day following, or Monday, December 13, 1948.

The application for appeal was timely under the method of computation of time consistently approved by this Court. *F. R. C. P. No. 6 (a); Street* v. *U. S.*, 133 U. S. 299, 10 S. Ct. 309, 33 L. Ed. 631; *Monroe Cattle Co.* v. *Becker*, 147 U. S. 47, 13 S. Ct. 217, 37 L. Ed. 72. This method of computing time is now followed almost universally in legal matters and in commercial affairs.

Mr. Chief Justice Vinson concurred with Mr. Justice Rutledge in an opinion which cited numerous cases and ruled that an application for appeal under similar circumstances and a comparable statute was timely, in *Sherwood Bros. v. District of Columbia*, (App. D. C., 1940) 113 F. 2d 162, Sub. 1-3. See also, *Wilson v. Southern Ry. Co.*, (C. C. A. 5) 147 F. 2d 165, and 52 Am. Jur. 342, 347, Secs. 17 to 21, and supplement.

(B)

Jurisdiction is vested under Public Law 773, effective September 1, 1948.

The statement printed under Rule 12, shows that jurisdiction is vested under *28 U. S. C., Sections 1257(b) and 2106*, as revised and effective September 1, 1948, because the final decision of the Supreme Court of Missouri sustained the validity of *Section 1038, R. S. of Missouri, 1939, Vol. 1, page 284*, which was directly drawn in question as repugnant to *U. S. Constitution, Art. IV, Section 1*, and *28 U. S. C. 687, now Section 1738*, as revised and effective September 1, 1948. The construction of the state statute contravenes and is repugnant to *U. S. Const., Art. IV, Sec. 1, Amendment XIV, Section 1*, and to *28 U. S. C. 687, now Section 1738*. Review by appeal is proper. *Angel v. Bullington*, Sub. 4, 330 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 832.

STATUTES INVOLVED.

The statute of the State of Missouri, the validity of which is involved, as construed by the Supreme Court of Missouri (R. 19), is Section 1038, R. S. Mo., 1939, Vol. 1, page 284, which reads:

"Every judgment, order or decree of any court of record of the United States, or of this or any other

state, territory or country, shall be presumed to be paid and satisfied after the expiration of ten years from the date of the original rendition thereof, or if the same has been revived upon personal service duly had upon the defendant or defendants therein, then after ten years from and after such revival, or in case a payment has been made on such judgment, order or decree, and duly entered upon the record thereof, after the expiration of ten years from the last payment so made, and after the expiration of ten years from the date of the original rendition or revival upon personal service, or from the date of the last payment, such judgment shall be conclusively presumed to be paid; and no execution, order or process shall issue thereon, nor shall any suit be brought, had or maintained thereon for any purpose whatever."

The statutes of the State of Colorado (R. 20) which are involved and which (together with the judgment of revivor rendered by the Colorado District Court at Denver (R. 4) thereunder) were denied Full Faith and Credit by the Missouri Courts, are *3 Colo. Ann. St., 1935, Ch. 93, Section 2, page 1036*, and *Chapter 6, Section 54(H), page 210*, which provide:

"Sec. 2: All and singular the goods and chattels, lands, tenements and real estate of every person against whom any judgment shall be obtained in any court of record, either at law or in equity for any debt, damages, costs or any other sum of money, shall be liable to be sold on execution to be issued upon such judgment; * * * and, provided, further, that execution may issue on such judgment, to enforce the same, at any time within twenty years from the entry thereof, but not afterwards unless revived as provided by law * * *"

"A judgment may be revived against any one or more judgment debtors whether they are jointly or severally liable under the judgment. * * * A revived

judgment must be entered within twenty years after the entry of the judgment which it revives, and may be enforced and made a lien in the same manner and for a like period as an original judgment."

STATEMENT OF THE CASE.

This action was instituted December 13, 1945, in the Circuit Court at Kansas City, Missouri, on a final judgment of revivor rendered by the Colorado District Court at Denver, on October 27, 1945, in conformity with the Colorado statutes above quoted (R. 4). The aggregate sum due when the trial court entered judgment denying recovery on June 27, 1947, was $8,044.67. The original judgment of December 8, 1927, for $3,493.01 and costs was rendered on defendant's note, following personal service of summons upon him at his residence in Denver (R. 3).

A copy of the original judgment and of the judgment of revivor of October 27, 1945, authenticated under *28 U. S. C. 687, now Section 1738,* and a similar *Section 1864, R. S. Mo., 1939,* were attached and made a part of the petition (R. 3, 4). Respondent's answers to interrogatories admitted he was personally served with and that he received copies of the Notice of Motion and Motion to Revive as shown at R. pp. 6, 8. The authenticated copies of both judgments, with the interrogatories and Respondent's answers thereto, were offered and introduced in evidence over Respondent's objections that they were inadmissible because the judgments were barred by limitations prescribed by Section 1038, R. S. Mo., 1939. Further objections were made that the original judgment was not revived within ten years and that the revivor was based upon the notice and motion to revive, which were served upon him in Kansas City, Missouri, by a Deputy Sheriff of Jackson County and also by registered United States

mail, which was not "personal service" as contemplated by Section 1038 (R. 9, 12).

Respondent filed an answer (R. 5) but offered no evidence. Counsel stipulated that the applicable laws of Colorado were to be considered (R. 12).

The Colorado laws pleaded in the petition, with the decisions thereon, were entitled to judicial notice by *Missouri Civil Code, Section 847.54, Laws of Mo., 1945, page 353.* The petition averred that the District Court of Colorado at Denver had general jurisdiction of all cases at law and in equity under *Colorado Code of Civil Procedure, Volume 1, 1935 Colo. Ann. St.*, and that the original judgment and the judgment of revival complied with and were authorized by *Chapter 88, Section 2, as amended March 7, 1935*, and that the plaintiff was entitled to have execution on the judgment of revivor in the sum of $3,493.01, with simple interest at 8% per annum from December 8, 1927, to March 7, 1935, and at 6% per annum thereafter until paid, together with the costs assessed. Recovery was prayed accordingly, with costs, and that the same full faith and credit be accorded thereto in Missouri, under U. S Const., Art. IV, Sec. 1, that the judgment of revivor was entitled to have and was given under Colorado law (R. 1, 3).

Appellant filed its motion for a new trial in due time after entry of judgment for defendant (R. 13, 16). It challenged the denial of the full faith and credit secured by *U. S. Constitution, Article IV, Section 1*, and by *28 U. S. C. A. 687*, and by a similar state statute, *Section 1864, R. S. Mo., 1939*, and the refusal of the trial court to follow the duly cited controlling decisions, which were binding upon it (R. 14, 16). Upon overruling its motion for new trial, Appellant perfected its appeal to the Supreme Court

of Missouri (R. 17), where the case was assigned to Division One, which filed its opinion on July 12, 1948 (R. 19).

Within due time, Motion to Rehear and to Transfer to the Court *En Banc* were filed, in which Appellant specifically challenged the denial of Full Faith and Credit to the Colorado judgment of revivor and that the construction of Section 1038, R. S. Mo., 1939, contravened and was repugnant to *U. S. Constitution, Article IV, Section 1* and to *28 U. S. C. A., Section 687*, and to controlling cases duly cited therein (R. 23, 34). The motions were both overruled on September 13, 1948, which constituted final judgment (R. 34). No further procedure was authorized by Missouri law.

An appeal to this Court was allowed by the Acting Chief Justice of the Supreme Court of Missouri, on Monday, December 13, 1948 (R. 35).

SPECIFICATION OF ERRORS.

1. The judgment of the trial court and of the Supreme Court of Missouri on appeal erred in denying full faith and credit to the valid, authenticated judgment of revival of the Colorado District Court and the Colorado statutes which were duly pleaded and proved, in contravention to *U. S. Const., Art. IV, Section 1* and to *U. S. C. A., Title 28, Section 687*, now Sections 1738, 1739, as revised and effective September 1, 1948 (R. 40).

2. *Section 1038, R. S. Mo., 1939* (Volume 1, page 284), as construed and applied by the opinion of the Supreme Court of Missouri operated extraterritorially contrary to *U. S. Const., Amendment XIV, Section 1*, and contravenes and is repugnant to *U. S. Const., Art. IV, Section 1* and to *28 U. S. C. A., Section 687* (now sections 1738 and 1739 as revised) (R. 40).

3. The judgment for defendant was erroneous and the Supreme Court of Missouri erred in refusing to reverse same and in failing to direct entry of judgment for appellant upon the uncontroverted pleadings and proof. It thereby denied the rights secured to appellant under *U. S. Const., Art. IV, Section 1*, to have full faith and credit accorded in the Missouri courts to the valid and duly authenticated and proved valid judgment of revivor rendered by the Colorado District Court at Denver (R. 40, Jurisdictional Statement, 6, 7).

SUMMARY OF ARGUMENT.

1. Under the laws of Colorado, the 1927 judgment was reanimated by the judgment of revivor with a new right of enforcement from October 27, 1945, in the same manner and for a like period as an original judgment. All issues necessarily involved therein were concluded under the Colorado law. Such issues were not subject to readjudication in Colorado, nor in Missouri, after the judgment became final. Limitations and presumptions of payment were avoided and reset to run anew from October 27, 1945.

2. The opinion of the Supreme Court of Missouri did not purport to determine the validity and effect of the judgment of revivor under Colorado law, which was a mandatory duty imposed by U. S. Constitution, Article VI, under the issues presented by the demand for full faith and credit secured by U. S. Constitution, Article IV, Section 1, and 28 U. S. C. 687. It erred in refusing to enforce the Colorado judgment of revivor because a similar judgment would not have been rendered in Missouri if the proceedings had originated in Missouri in the first instance. The Missouri courts erred in denying full faith and credit to the valid, authenticated judgment of the

Colorado District Court and to the Colorado statutes which were duly pleaded and proved. The judgment and Section 1038, R. S. Mo., 1939, as construed and applied are repugnant to U. S. Constitution, Article IV, Section 1, and to 28 U. S. C. 687.

3. The Missouri courts erred contrary to the foregoing and to the 14th Amendment, Section 1, in extraterritorially extending its statutes to readjudicate the underlying cause of action which was conclusively adjudicated between the parties by the Colorado judgment of revivor.

4. The judgment of revivor was a continuation of the original action. Service of the motion to revive and notice upon defendant in Missouri was valid under Colorado law. It met the requirements of due process of law and bound the Missouri courts to recognize it under Article IV, Section 1, and 28 U. S. C. 687.

ARGUMENT.

I.

The Colorado judgment of revivor reanimated the 1927 judgment with a new right of enforcement from October 27, 1945, in the same manner and for a like period as an original judgment. All questions necessarily involved were conclusively barred thereby. Limitations were avoided and reset to run anew from that date.

The Colorado statutes quoted, pages 4-5, specify that a revived judgment "may be enforced and made a lien in the same manner and for a like period as an original judgment." "Execution may issue on such judgment to enforce the same, at any time within twenty years from the entry thereof but not afterward, unless revived as provided by law."

La Fette v. Salisbury, 43 Colo. 248, 95 Pac. 1065, 1066, ruled that

> "The effect of a judgment reviving a judgment as an adjudication of all questions necessarily involved does not differ from that of other judgments. In such proceedings the judgment debtor must interpose such defenses as he may have, or they will be forever barred by the judgment of revivor. Freeman on Judgments, Sec. 448."

Freeman is frequently cited in Colorado cases. 2 *Freeman on Judgments*, 5th Ed., p. 2290, Sec. 1102, states:

> "The effect of a judgment entered upon *scire facias* as an adjudication does not differ from that of other judgments. It cannot be collaterally avoided for

mere error or irregularity, and until set aside by some proper proceeding, it conclusively establishes the facts necessary to support it as against all persons properly made parties thereto, so that they cannot afterwards insist that there was no such judgment, nor that it had been paid prior to its revival, or released or discharged by proceedings in bankruptcy or otherwise. But a mere judgment of revivor does not otherwise add anything to the efficacy of the original judgment, since it is not a readjudication of the subject matter but is simply a continuation of that judgment in force and effect."

Kuykendall v. Tod, (C. C. A. Colo., 1915) 219 Fed. 707, cert. den. 238 U. S. 635, 54 L. Ed. 1499, 35 S. Ct. 939, is closely analogous. Judgment of the Colorado Federal District Court was affirmed, in an action filed in 1913 to recover on a 1912 Wyoming judgment, which revived a judgment originally rendered in 1895. The six year Colorado statute of limitations barring foreign judgments was pleaded in defense to the Wyoming judgment of 1895, despite the revivor. It was ruled that limitations began to run anew from the date of revivor, whether the Wyoming proceeding was considered as new, or as a continuation of the original action. The judgment of revivor was held to avoid the statute of limitations and to set it running again from its date; to grant a new right of enforcement and to reinstate the old judgment. The long established practice in the English courts was considered whereby revival by *scire facias* prevented the original judgment from being considered as standing, within the meaning of the word in the expression "ten years standing."

31 Am. Jur. 61, Section 390, declares:

> "The revival of a judgment makes it effective for the designated ensuing period of years, whether it was dormant because of the lapse of the statutory period or because of the death of a party thereto. * * * In addition to an affirmation of the fact that the judgment is unpaid, the general effect of the revival of a judgment dormant because of the lapse of the statutory period is to restore it to life; it is generally regarded as a reanimated judgment, not a new one."

49 C. J. S. 1020, Sec. 549, states:

> "The revival of a judgment by regular proceedings reinvests it with all the effect and conditions which originally belonged to it and which have been wholly or partly suspended by lapse of time."

A judgment of revival was held to be a remedy for avoidance of the statute of limitations and to avoid a presumption of payment from lapse of time, in *Mo. & Ark. L. & M. Co.* v. *Greenwood*, 249 U. S. 120, 63 L. Ed. 538, 39 S. Ct. 202. Additional authorities urged and discussed at length in Appellant's Motion to Rehear (R. 29, 34), are adopted by reference for brevity.

II

The judgment of the trial court and of the Supreme Court of Missouri on appeal erred in denying full faith and credit to the valid, authenticated judgment of revival of the Colorado District Court and to the Colorado statutes which were duly pleaded and proved, contrary to U. S. Constitution, Article IV, Section 1, and 28 U. S. C. 687, now Section 1738 as revised and effective September 1, 1948. Section 1038, R. S. Mo., 1939, as construed and applied by the Supreme Court of Missouri, is repugnant to the foregoing and to U. S. Const., Amendment XIV, Section I, and is therefore void.

A.

The errors of the Court below are obvious from the questions stated in its final opinion and from the rulings made contrary to controlling authorities.

The questions are quoted. The rulings contrary to controlling authorities are quoted in italics, viz.:

> "The question is, Does Section 1038 bar the revived judgment because it was not revived within 10 years from the date of its original rendition the limitation fixed for revival by Sec. 1271. This section is as follows: 'The plaintiff or his legal representative may, at any time within ten years, sue out a *scire facias* to revive a judgment and lien; but after the expiration of ten years from the rendition of the judgment, no *scire facias* shall issue' " (R. 20).
>
> "It is the general rule that the *lex fori* governs the limitation of actions within its borders, and that *the enforcement of a foreign judgment goes to the remedy and not to its merits or validity under the lex loci.* In short the *lex fori* determines the time within which a cause of action shall be enforced. 11 Am. Jur., Secs. 191, 192, pp. 505, 507; *Northwestern Brewers Supply Co. v. Vorhees, Supra.*' "

"Now to the question, Does Sec. 1038 bar the revived judgment because it was not revived within 10 years from the date of rendition of the original judgment? We assume, without deciding, for the purposes of this question, that the extraterritorial personal service was valid for revival under Section 1038" (R. 21).

"And the only reasonable conclusion to draw is that a revived judgment, domestic or foreign, absent a payment as provided in Sec. 1038, is barred under said Section unless the revival was within 10 years from the date of original rendition or, if such is the case, within 10 years from the last revival. In other words, a foreign judgment, original or revived, has the same standing in Missouri, no better, no worse, than a domestic judgment. This does not run counter to the full faith and credit provision of the federal Constitution, because, as we have seen, the *enforcement of a foreign judgment goes to the remedy only and that is a matter for the law of the forum*" (R. 22).

The judgment was for defendant upon the merits. It was not a judgment of dismissal (R. 12, 13). Appellant's rights were thereby concluded everywhere. *Annotation, 149 A. L. R. 575, 576.*

The opinion stated that this action was to recover on the Colorado revived judgment rendered on October 27, 1945, after personal service upon defendant in Missouri. It did not mention that a notice and motion to revive was served on defendant in conformity with Colorado law, and not a writ of *scire facias* (R. 19).

Its first query was of possible bar by limitations under *Section 1271*, which is quoted, but which Respondent did not interpose as a defense in his answer (R. 5). That is a mere procedural section authorizing *scire facias* to revive domestic judgments and their liens, similar to the writ first given by *13 Edw. 1*, which was once in force in Missouri (*Garner v. Hayes*, 3 Mo. 346). The irrelevancy of that

section to govern procedure in Colorado, which long since abandoned the writ, is patent.

The anomalous decision did not remotely purport to determine the validity and effect of the judgment in Colorado, so as to give it the same credit, validity and effect in Missouri, *which were the issues presented by the demand for full faith and credit secured by U. S. Constitution, Article IV, Section 1.* The determination of those issues was a mandatory duty under Article VI of the Constitution, as the supreme Law of the Land.

The opinion declared, but then did not apply the rule to the judgment of revivor, that "the *lex fori* determines the time within which an action shall be enforced." That judgment was within the time provided by Colorado law. The Missouri action was filed 47 days thereafter. The ten year limitation statute had no possible application.

Corollary to the rule above quoted and of equal merit, are the rules that:

(a) *A statute of limitations is a shield but not a sword.*

Annotation, 164 A. L. R. 1387.

(b) *Limitations affect the remedy but not the right. Denial of recovery because the action is barred by limitations of the forum does not extinguish the cause of action nor bar recovery in other jurisdictions in which longer periods of limitation govern.*

A. L. I., Restatement of the Law of Judgments, Sec. 49, Comment (a).

Annotation, 164 A. L. R. 693.

53 C. J. S. 922, Sec. 6(b).

The opinion relied upon erroneous dicta declared in the ill advised action filed by *Northwestern Brewers Supply Co.* v. *Vorhees*, (Mo. Sup., 1947) 203 S. W. 2d 422. That

case denied recovery on a Wisconsin judgment rendered 14 years before, which was not barred by limitation in Wisconsin until 20 years after its rendition. Section 1038 was properly held to bar the action as a 10 year statute of limitations. It erroneously ruled also that the conclusive presumption of payment of a judgment after ten years, which the Missouri statute also created, applied to the Wisconsin judgment, contrary to the Wisconsin statute. The latter ruling was erroneous dicta and unnecessary to the decision. Nevertheless, when the judgment became final, the parties were bound thereby. *A. L. I., Restatement, Judgments, Section 48.* It constituted both a shield and a sword which thereafter barred recovery on the Wisconsin judgment everywhere, as it must be assumed that full faith and credit will be accorded to valid judgments by courts elsewhere, if not always in Missouri. The distinction between limitations which prohibit an action and the presumption of payment which obliterates a debt, is shown in *34 Am. Jur. 16, Section 6.*

The *Vorhees* case purported to follow *M'Elmoyle* v. *Cohen*, 13 Pet. 326, 10 L. Ed. 177, and *Bacon* v. *Howard* 20 How. 22, 15 L. Ed. 811. Both ruled that a State may legislate upon the remedy in suits on judgments of other states, "EXCLUSIVE OF ALL INTERFERENCE WITH THEIR MERITS." The emphasized qualifying restriction which both cases declared, was wholly disregarded. The Missouri statutory presumption of payment was applied to destroy the plaintiff's rights under the Wisconsin judgment and statute notwithstanding that the creditor was entitled to enforce it there for the remainder of the 20 year limitation period.

Actions on foreign judgments may lawfully be barred by reasonable limitation periods after their dates of rendition. Full faith and credit and recognition of their validity

is not thereby denied. The merits and right to enforce the judgment in the State of its origin or elsewhere is not affected by such refusal. Each State may limit the life of judgments rendered therein. They may not lawfully superimpose such limitations of life, to decree the death of foreign judgments. The duration of judgments is a matter within the province of the State which gives them life. The laws of the several States are of equal dignity. The rules stated accord them the equal respect to which all are entitled.

Appellant demanded but Missouri denied the faith and credit secured by *Art. IV, Sec. 1*, to the judgment of revival which was valid under Colorado law for twenty years from October 27, 1945. It was lawfully entitled to recover thereon in any court, state or federal, within the limitation periods applicable in any jurisdiction where the defendant might be found. The judgment for defendant clearly erred, but until it is reversed, the defendant is armed with a sword to bar recovery in all courts which respect the command of the federal Constitution to accord full faith and credit to judgments of other States, including the Colorado court which rendered the judgment of revival to which Missouri's Courts erroneously denied such faith and credit.

Angel v. *Bullington*, (N. C., 1947) 330 U. S. 183, 67 S. Ct. 657, 91 L. Ed. 832, is illustrative. The Supreme Court of North Carolina denied Bullington recovery on notes made in Virginia, because a local statute prohibited deficiency judgments after foreclosure of a mortgage or deed of trust. That court held that the statute pertained to the adjective law and was a limitation upon the jurisdiction of the courts of that State. Bullington did not appeal but filed a new action in the Federal District Court. This Court ruled that for the purposes of *res judicata*, the significance of what a court says it decides, is controlled by the issues

which were open for decision. Federal Constitutional claims were plainly and reasonably made in the action in the State court which were there denied by saying that the statute dealt with procedure but not with substantive matters. The sufficiency of the grounds of denial of a federal right was held to be questions for this Court.

This Court ruled that the merits of the controversy were adjudged by the State court, since that court, or this Court on appeal, might have decided that the statute did not bar Bullington's first action. Since Bullington permitted the State court judgment to become final, it was held to be *res judicata* and a bar to the action in the Federal District court. All issues which were or could have been determined in an action in which the judgment became final, were held to be final and conclusive between the parties thereafter.

Respondent had full notice and opportunity to oppose the Colorado judgment of revivor. Final judgment therein was *res judicata* of all issues which were raised by his collateral attack in Missouri.

The Missouri Court did not avoid the denial of the federal right of full faith and credit to the Colorado judgment of revivor, by declaring that "*the enforcement of a foreign judgment goes to the remedy and not to its merits or validity under the lex loci,*" or that a foreign judgment is barred "*unless the revival was within ten years from the date of original rendition,*" or that "*the enforcement of a foreign judgment goes to the remedy only and that is a matter for the law of the forum.*"

11 Am. Jur. Section 192, page 508, upon which the opinion also relied, cites *Cuykendall* v. *Doe*, 129 Iowa 453, 105 N. W. 698, 3 L. R. A. (N. S.) 449, 113 Am. St. Rep. 472, in support of the text reading:

"A judgment entered upon a promissory note within the time permitted by the laws of the State in which the judgment is entered, cannot be defeated in another state because its statute of limitations had barred the debt before the judgment was entered."

The *Cuykendall* case adjudged that full faith and credit must be accorded to a Delaware judgment which was rendered under the terms of a cognovit note delivered in that state 16 years before, although such clauses were invalid in Iowa and a similar judgment was precluded by Iowa limitation laws. The Court observed that the debtor, as a resident of Delaware, accepted and assumed the obligations imposed by its laws. It pertinently commented that the assertion that the Iowa law governed the rights of the parties, because the debtor subsequently migrated and resided there for the period of its limitation laws, constituted its own repudiation.

Lamb resided in Colorado before and after the rights and obligations of the parties were adjudicated by the original 1927 Colorado judgment. The Colorado Act of 1935, which reduced the judgment interest rate from 8% to 6% per annum was a benefit to him and a detriment to Appellant, *but it still governed their respective rights.* The obligations binding upon Respondent under Colorado law which he voluntarily accepted as a resident, were not cast off at its borders when he migrated to Missouri. The revivor judgment bound him anew in Colorado. It was equally binding and was entitled to be enforced in Missouri, at any time before the Missouri 10 year limitation period intervened.

That just principle is the true basis of enforcing private rights and obligations which originate elsewhere, rather than comity or courtesy between sovereigns which have no real interest to be subserved in such matters (Cf.

Beale, The Conflict of Laws, (1935) pp. 1371, 1372, 1413, 1416, Secs. 430.1, 446.1 and 449.1; *Freeman on Judgments*, Vol. 3, Section 1494; *Annotation, 148 A. L. R. 991, and case, p. 984.*

The importance attached to that principle is evident from the constitutional command of Article IV, Section 1, which the States must obey and by its prior counterparts in the Resolution of the Continental Congress in 1777 and in the Articles of Confederation (March 1, 1781) and by the Act of May 26, 1790, enacted by the first Congress under the Constitution to implement *Article IV, Section 1.*

Experience from the days of the Revolution and under the Confederation demonstrated that comity was a mere rope of sand which did not secure enforcement of obligations incurred elsewhere, against citizens who were at liberty to migrate from State to State and into the opening Northwest Territories, without prior leave of the sovereign to depart the Realm of other formalities. Denying recovery on obligations incurred and valid in other states as was only too often done, resulted in restricted credit and fermented disunity, discontent, general economic uncertainty and reflected upon the integrity of the courts.

Law reviews have often remarked the uniformity of the decisions of this Court from its beginning, in requiring full faith and credit (and nothing less) to be accorded to money judgments lawfully rendered between private litigants under the laws of sister states, subject only to reasonable limitation laws of the forum and to inquiry into the jurisdiction of courts under the laws of the state of rendition, as the sole recognized exceptions.

The opinion below erred in assuming that a valid second defense was "that the service upon defendant for revival of the Colorado judgment was not personal service within the meaning of that term in Section 1038" (R. 23).

Whether such service conformed with or was contrary to Missouri law is not material. Colorado law governed and full faith and credit was required to be given thereto (Subdivision C herein).

B:

The Missouri courts contravened U. S. Constitution, Article IV, Section 1, and Amendment XIV, Section 1, and 28 U. S. C. 687, now Section 1738, by extraterritorially extending its statutes to readjudicate thereunder the underlying cause of action which was res judicata and merged in the Colorado judgment of revivor. Full faith and credit and the same effect which the judgment of revivor had under Colorado law was erroneously denied thereto and requires reversal here.

Section 1038, R. S. Mo., 1939, as applied in the opinion below, is clearly delineated by slightly paraphrasing the language of *Christmas* v. *Russell*, 5 Wall. 290, 301, 302, 18 L. Ed. 475, 478, 479, as follows:

> "Instead of being a statute of limitations in any sense known to the law," *Section 1038 as construed,* "in legal effect, is but an attempt to give operation to the statute of limitations of that state in all other states of the Union, by denying the efficacy of any judgment recovered in another state against a citizen of" *Missouri* "for any cause of action which was barred in her tribunals under that law. Where the cause of action that led to the judgment was not barred by her statute of limitations the judgment may be enforced; but if it would have been barred in her tribunals, under her statute, then the prohibition is absolute that no action shall be maintained on the judgment."
>
> "* * * Where the jurisdiction has attached, the judgment is conclusive for all purposes, and is not open to any inquiry upon the merits." * * * "If a judgment is conclusive in the state where it was pronounced, it is equally conclusive everywhere" in the courts of the United States. 2 Story, Const., 3rd Ed., Sec. 1313.

"5. Applying these rules to the present case, it is clear that the statute which is the foundation of the second plea in this case is unconstitutional and void as affecting the right of the plaintiff to enforce the judgment mentioned in the declaration. Beyond all doubt the judgment was valid in Kentucky and conclusive between the parties in all her tribunals." * * * "*It is not competent for any other state to authorize its courts to open the merits and review the cause, much less to enact that such a judgment shall not receive the same faith and credit that by law it had in the state courts from which it was taken*" (Italics ours).

The Mississippi statute there held void provided that no action should be maintained on any judgment rendered by any court without that state against a resident, if the cause of action would have been barred by any act of limitation, if such suit had been brought in Mississippi.

Keyser v. *Lowell*, (C. C. A. Colo., 1902) 117 Fed. 400, ruled that a Colorado statute which barred actions on judgments rendered in other states, if the underlying causes of action were barred under its statute, was not a statute of limitations but was a statute of nullification or prohibition which denied full faith and credit and was unconstitutional and void.

That Missouri was without power to give extraterritorial effect to its laws and was required to give the Colorado judgment of revivor the same force and effect which it had in that State, is established by *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, 64 S. Ct. 208, 88 L. Ed. 149, and *Morris* v. *Jones*, 329 U. S. 545, 67 S. Ct. 451, 91 L. Ed. 1296.

Roche v. *McDonald*, 275 U. S. 449, 72 L. Ed. 365, 48 S. Ct. 142, ruled upon a Washington statute which provided that a judgment should cease to be a charge and that no suit should be had to extend its duration or to continue it in force beyond six years. Roche sued in Oregon on a

Washington judgment. Judgment against McDonald was rendered thereon in Oregon more than six years after the date of the original Washington judgment. Roche thereafter sued to enforce the Oregon judgment in Washington. The Washington courts sustained McDonald's defense that the Washington statute prohibited recovery because the Oregon judgment was rendered more than six years after the date of the original judgment in Washington. The Washington courts concluded (as in effect does the opinion below), that the judgment of a sister state should be viewed "*in the light of the foundation upon which it rests* and the judgment law of our own state."

In reversing the Washington courts, Mr. Justice Sandford said:

> "It is settled by repeated decisions of this court that the full faith and credit clause of the Constitution required that the judgment of a state court which had jurisdiction of the parties and the subject matter in suit, shall be given in the courts of every other state the same credit, validity and effect which it has in the state where it was rendered, and be equally conclusive upon the merits; and that *only such defenses as would be good to a suit thereon in that state can be relied on in the courts of any other state*" (Citing cases). "This rule is applicable where a judgment in one state is based upon a cause of action which arose in the state in which it is sought to be enforced, as well as in other cases; and the judgment, if valid where rendered, MUST BE ENFORCED IN SUCH OTHER STATE, ALTHOUGH REPUGNANT TO ITS OWN STATUTES" (Citing cases; emphasis ours).

In *Faumtleroy* v. *Lum*, 210 U. S. 231, 236, 52 L. Ed. 1039, 1041, 28 S. Ct. 641, suit on a Missouri judgment was filed in Mississippi. The Missouri judgment was rendered on a

contract made in Mississippi to gamble in cotton futures. A Mississippi statute made the contract a misdemeanor and provided that such contracts "*should not be enforced by any court.*" In reversing the Mississippi courts for refusing to accord full faith and credit to the Missouri judgment, the court said:

> "The doctrine laid down by Chief Justice Marshall was 'that the judgment of a state court should have the same credit, validity and effect in every other Court in the United States, which it had in the state where it was pronounced and that whatever pleas would be good to a suit thereon in such state and none others, could be pleaded in any other court of the United States.'"

In *Kenny* v. *Supreme Lodge L. O. M.*, 252 U. S. 411, 415, 64 L. Ed. 638, 40 S. Ct. 371, suit on an Alabama judgment was filed in Illinois. The Alabama judgment was on a cause of action which could not be brought or prosecuted under an Illinois statute. The Illinois statute was held to be unconstitutional and void because it was repugnant to the full faith and credit clause.

Allegheny County v. *Maryland Casualty Co.*, 132 F. 2d 894 (C. C. A. 3), 897, held, Sub. 5-8:

> "But it must be remembered that a judgment is the sentence of the law given by the court as the result of proceedings instituted therein for the redress of an injury. If it is a final judgment it terminates the controversy and either merges into itself or bars the plaintiff's claim. *It thus itself becomes the generating source of new rights and liabilities of the parties. Under the constitution it is entitled to full faith and credit in every American jurisdiction*" (Emphasis ours).

Deposit Bank v. Board of Councilmen of Frankfort, 191 U. S. 499, 24 S. Ct. 154, 48 L. Ed. 276, l. c. 280, 281, ruled:

"The doctrine of estoppel by judgment is founded upon the proposition that all controversies and contentions involved are set at rest by a judgment or decree lawfully rendered which, in its terms, embodied a settlement of the rights of the parties. It would undermine the foundation of the principle upon which it is based if the court might inquire into and revise the reasons which led the court to make the judgment. In such case, nothing would be set at rest by the decree; but the matter supposed to be finally adjudicated, and concerning which the parties had had their day in court, could be reopened and examined, and if the reasons stated were, in the judgment of the court before which the estoppel is pleaded, insufficient, a new judgment could be rendered because of these divergent views, and the whole matter would be at large. In other words, nothing would be settled, and the judgment, unreversed, instead of having the effect of forever settling the rights of the parties, would be but an idle ceremony. We are unable to find reason or authority supporting the proposition that because a judgment may have been given for wrong reasons or has been subsequently reversed, that it is any the less effective as an estoppel between the parties while in force."

Local laws, policies, states' rights or preference for its own laws are not in issue in a suit on a judgment of a sister state. Enforcement of the same rights and liabilities which governed the parties under the laws of the state in which the judgment was rendered is just and should have been granted by comity (15 C. J. S. 836). The duty was mandatory under the full faith and credit clause.

50 C. J. S. 480, 481, 482, Sec. 889 (D) (E), epitomizes the rulings of the numerous cases cited. The text states:

"(d) There may be exceptional cases where the full faith and credit clause does not require that recognition be given a judgment of a sister state which is in violation of the laws and policy of the forum, and the Supreme Court of the United States is the final arbiter of such cases.

"There are no exceptions in the case of a money judgment rendered in a civil suit, the policy or law of the forum in which it is sought to enforce such a judgment cannot impair the force and effect which the full faith and credit clause of the federal Constitution and the Act of Congress require to be given to such a judgment outside the state of its rendition. * * * *It compels enforcement of a judgment, even though a suit on the original cause of action, if brought in the forum before judgment was obtained, would have been barred by limitations.* A judgment must be recognized, even though the statute on which the judgment is based need not be applied because it is in conflict with the law and policy of the forum."

"(e) In accordance with the general rule, considered *supra* subdivision (b) of this section, that a judgment is entitled to the same faith and credit as is accorded it in the state where rendered, a judgment is not subject to collateral attack in another state if not subject to such attack in the state where rendered."

The judgment of revival was conclusive as to all of the *media concludendi*, and was not subject to impeachment, whether right or wrong. It was not open for re-examination by the Missouri courts. *Morris* v. *Jones*, 329 U. S. 545, 67 S. Ct. 451, 91 L. Ed. 488; *Milwaukee County* v. *White*, 296 U. S. 268, 56 S. Ct. 229, 80 L. Ed. (Sub. 15) 228; *Titus* v. *Wallick*, 306 U. S. 282, 59 S. Ct. 557, 83 L. Ed. 653, 657, Sub. 2; *Adam* v. *Saenger*, 303 U. S. 59,

58 S. Ct. 454, 82 L. Ed. 649; *American Express Co.* v. *Mullins*, 212 U. S. 311, 29 S. Ct. 381, 53 L. Ed. 525; *Broderick* v. *Rosner*, 294 U. S. 629, 55 S. Ct. 589, 79 L. Ed. 1100; *Davis* v. *Davis*, 305 U. S. 32, 59 S. Ct. 3, 83 L. Ed. 26, 29.

C.

The judgment of revivor was a continuation of the original action. Service of the notice and motion to revive upon defendant in Missouri was valid under Colorado law. The procedure met the requirements of due process of law and was binding upon the Missouri Courts under the Full Faith and Credit Clause.

The original judgment in 1927 was on personal service upon defendant in Colorado. The motion to revive and notice, followed by the judgment of revivor, was a continuation of the original action and not a new action.

The notice essential to due process of law is the original notice whereby the court acquired jurisdiction of the person and not notice of the time when jurisdiction which is already acquired will be exercised.

The Lessee of Walden v. *Craig's Heirs*, 14 Pet. 147, 10 L. Ed. 393.

The U. S. v. *Ritchie*, 17 How. 525, 15 L. Ed. 236.

McKnight v. *Craig's Adm.*, 6 Cranch 183, 187, 3 L. Ed. 193.

Plimpton v. *Mattakeunt*, 6 Fed. Supp. 72, 77.

In *Michigan Trust Co.* v. *Ferry*, 228 U. S. 346, 33 S. Ct. 550, 57 L. Ed. 867, 874, Mr. Justice Holmes said:

> "Ordinarily jurisdiction over a person is based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign's pleasure. But when that power exists and is asserted by service at the beginning of a cause, or if the party submits to the jurisdiction in whatever form may be required, we dispense with the necessity of maintaining

the physical power and attribute the same force to the judgment or decree, whether the party remain within the jurisdiction or not. This is one of the decencies of civilization that no one would dispute. *It applies to Article IV, Section 1, of the Constitution, so that if a judicial proceeding is begun with jurisdiction over the person of the party concerned, it is within the power of a state to bind him by every subsequent order in the cause. Nations* v. *Johnson*, 24 How. 195, 203, 204, 16 L. Ed. 628, 631, 632. This is true not only of ordinary actions but of proceedings like the present" (Emphasis ours).

International Shoe Co. v. *Washington*, 326 U. S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95, 102, ruled:

> "But now that *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

Barber v. *Barber*, 323 U. S. 77, 65 S. Ct. 137, 89 L. Ed. 82, required the courts of Tennessee to accord full faith and credit to a North Carolina judgment for alimony. The amount due was determined by the North Carolina court after notice to the defendant who was outside of the jurisdiction, but upon whom personal service was had in the divorce action. *Cukor* v. *Cukor*, (Vt.) 168 A. L. R. 227, 49 Atl. 2d 206; *Durlacher* v. *Durlacher*, (C. C. A. Nev.) 123 F. 2d 70-72, and *Durlacher* v. *Durlacher*, 17 N. Y. S. 2d 643, 647, 173 Misc. 329, hold that full faith and credit must be accorded to judgments for alimony, where judgments for the arrears were entered by the New York Courts after service of notice by registered mail to defendants who were out-

side of New York but who were personally served in the original divorce actions.

The Colorado judgment of revivor is clearly distinguished from the new judgment rendered in an action for debt under the Pennsylvania law, with which the court had to deal in *Owens v. McCloskey, Exr. of Henry*, 161 U. S. 642, 16 S. Ct. 693, 40 L. Ed. 837. The Court there held that the Pennsylvania judgment rendered for "want of appearance on two returns of nihil," without actual notice to the defendant, did not remove the statutory bar of limitation in Louisiana, because the judgment rendered in Pennsylvania according to its laws was an entirely new judgment for the principal, interest and costs due on the original. Cf. *Brown* v. *Wygant*, 163 U. S. 618, 16 S. Ct. 1159, 41 L. Ed. 284, and *Milliken* v. *Meyer*, 311 U. S. 457, 61 S. Ct. 339, 85 L. Ed. 278.

Constructive service upon a non-resident to revive a judgment was held valid in *Bank of Edwardsville* v. *Raffaele*, 381 Ill. 486, 45 N. E. 2d 651, 144 A. L. R. 401. An extensive *Annotation* follows that case in *144 A. L. R. 403*.

CONCLUSION.

The application by the Missouri courts of Section 1038, R. S. Mo., 1939, manifestly contravened *28 U. S. C. 687, now 1738*, and the provisions of the federal Constitution mentioned, which Appellant urged and relied upon throughout. The judgment indisputably denied Appellant the federal rights secured thereby and requires reversal.

Respectfully submitted,

MAURICE J. O'SULLIVAN,
Counsel for Appellant.

JOHN G. KILLIGER, JR.,
Of Counsel.